

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN C. MELLIES)	
Claimant)	
)	
VS.)	
)	
PACER INTERNATIONAL INC.)	
TAYLAR TRANSPORT INC.)	
Respondents)	Docket No. 1,001,565
)	
AND)	
)	
FIDELITY & GUARANTY INS.)	
UNINSURED)	
Insurance Carriers)	
)	
AND/OR)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Respondent, Pacer International Inc., and its insurance carrier request review of a May 23, 2002, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) determined claimant's employer, Mike Brown doing business as Taylor Transport Inc., was insolvent and further determined Pacer International Inc. (Pacer), was claimant's statutory employer. Consequently, the ALJ ordered Pacer to provide claimant's temporary total disability compensation benefits.

Pacer had entered into a subcontract with Michael Brown to provide pick up and delivery services. Pacer argues it is not claimant's statutory employer because it had specifically denied claimant's request for approval as a driver for Mike Brown. Pacer argues claimant's remedy is against the Workers Compensation Fund (Fund).

The Fund argues the contract between Brown and Pacer did not provide for Pacer's pre-approval of drivers. Consequently, the Fund argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Pacer is engaged in the trucking business. It picks up containers delivered by rail and transports them to locations designated by its customers. Pacer subcontracts with owners of trucks to perform the pick up and delivery of the containers. Such trucks are designated for the exclusive use of Pacer's transport services and have Pacer's name placed on the sides of the vehicles.

The subcontracts are between the owner of the trucks and Pacer, not between the driver and Pacer. Many times the driver is also the owner. But some owners don't drive their trucks, they hire others to drive their trucks.

Pacer entered into such a contract with Michael Brown. The June 2, 2000, Independent Contractor Service Operating Agreement provided that the contractor should, upon request, provide Pacer with information regarding the driver of the leased equipment.¹ And it further provided the contractor was responsible for hiring and firing his employees.²

On September 1, 2001, Michael Brown, doing business as Taylar Transport, hired the claimant as a truck driver to pick up containers and deliver them to a warehouse. Claimant was paid by Taylar Transport. The truck claimant drove had the name Pacer Cartage on its side.

On September 19, 2001, Pacer's general manager observed Brown's truck at a customer's location being driven by an individual other than Brown. Brown was advised that he could not have another individual drive his truck unless that person was separately approved by Pacer. Brown then had claimant fill out an application for Pacer's approval as a driver. Claimant noted that Brown had him fill out an application with Pacer but he did not know what it was about and he never heard anymore about it.

Pacer's general manager testified that claimant was not approved as a driver. He further testified that on September 25, 2001, Mr. Brown was notified claimant's application was not approved because claimant did not have two years driving experience.

On October 1, 2001, claimant was driving Brown's truck and was transporting a container from the rail yard to the loading dock of one of Pacer's customers. When claimant opened the doors of the trailer he was transporting, the load fell out onto claimant

¹ Hellebuyck Depo., Ex. 1, Section 6(c).

² Id., Section 8.

knocking him to the ground. Claimant suffered significant crush injuries to his legs as well as his kidneys.

Respondent Pacer argues that claimant's operation of Brown's vehicle on October 1, 2001, constituted breach of the contract between Pacer and Brown. Pacer argues that because claimant was not an approved driver, any work claimant performed on October 1, 2001, was not part of Pacer's trade or business. Pacer concedes that if Brown had been the driver he would have qualified as a statutory employee pursuant to K.S.A. 44-503(a).

K.S.A. 44-503(a) extends the application of the Workers Compensation Act to certain individuals and entities who are not the immediate employers of an injured worker.³ The purpose of the statute is to give employees of a sub-contractor a remedy against a principal contractor and to prevent employers from evading liability under the act by contracting with outsiders to do work which they have undertaken as a part of their trade or business.⁴ The statute provides:

Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; . . .⁵

There is a two-part test to determine whether the work which caused the injury is part of the principal's trade or business, i.e. (1) is the work being performed by the injured employee necessarily inherent in and an integral part of the principal's trade or business? (2) is the work being performed by the injured employee such as is ordinarily done by employees of the principal? If either of the foregoing questions is answered in the affirmative the work being done is part of the principal's trade or business, and the injured employee is a statutory employee of the principal.⁶

Claimant was hired by Michael Brown to drive a tractor trailer unit to pick up and deliver containers. The evidence establishes that Mr. Brown hired claimant as a driver to

³ *Hollingsworth v. Fehrs Equip. Co.*, 240 Kan. 398, 729 P.2d 1214 (1986).

⁴ *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348 (1992); *Atwell v. Maxwell Bridge Co.*, 196 Kan. 219, 409 P.2d 994 (1966).

⁵ K.S.A. 44-503(a).

⁶ *Hanna v. CRA. Inc.*, 196 Kan. 156, 409 P.2d 786 (1966).

meet his contractual obligations with Pacer. Claimant was injured performing those activities.

The evidence is uncontradicted that Pacer had subcontracted with Mr. Brown to perform pickup and delivery of containers to Pacer's customers. At the time of the accident, claimant was actually driving a tractor trailer unit and hauling goods for delivery to Pacer's customer. It is undisputed that the pick up and delivery of the containers was an inherent and integral part of Pacer's business. It was Pacer's business. It would defeat the clear intent of K.S.A. 44-503(a) to allow Pacer to avoid liability because of an alleged violation of the terms of the contract by claimant's immediate employer.

The fact that Brown may have breached his contract with Pacer does not alter claimant's status as Pacer's statutory employee. Claimant's uncontradicted testimony was that he was never apprised of the reason for or the result of his application made to Pacer. Claimant continued to perform his usual work activities for his employer Brown. Those work activities were clearly in furtherance of Pacer's trade or business. And the work activities were clearly those contemplated by the contract between Pacer and Brown. Pacer's remedy for Brown's violation, if any, of the terms of their contract would be against Brown. But such violation, if any, does not preclude a finding under the Workers Compensation Act that claimant was Pacer's statutory employee.

AWARD

WHEREFORE, the May 23, 2002, Order of Administrative Law Judge Bryce D. Benedict is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2003.

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent
J. Paul Maurin, Attorney for Fund
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation